

file



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application of Leo Galaszewski for Water Quality Certification to Fill a Wetlands on Property Adjacent to the Wolf River, Town of Wescott, Shawano County, Wisconsin

Case No. 3-NE-98-060

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER APPROVING WATER QUALITY CERTIFICATION

Hilgenberg Realtors, on behalf of Leo Galaszewski, filed an application with the Department of Natural Resources for water quality certification pursuant to sec. 401, Federal Clean Water Act, and Ch. NR 299, Wis. Adm. Code. The Department ordered Hilgenberg Realtors to publish a Notice of Water Quality Certification for Proposed 401 WQ Certification. The notice stated that the Department had granted water quality certification subject to specified conditions. Leonard Pubanz, *et al*, filed a petition pursuant to sec. 227.42, Stats., requesting that a contested case hearing be conducted to review the decision of the Department.

The Department granted the request for hearing. On June 10, 1998, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice a hearing was conducted on November 12, 1998, in Shawano, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The parties filed written argument after the close of the hearing. The applicant and the petitioners filed briefs on November 24, 1998. The Department did not file a brief.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Leo Galaszewski, Applicant, by

Attorney George Burnett
231 South Adams
Green Bay, WI 54115

Leonard Pubanz, *et al.*, Petitioners, by

Attorney Stephen J. Menard
117 North Main Street
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Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
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FINDINGS OF FACT

1. Leo Galaszewski owns real property adjacent to the Wolf River in Shawano County. The legal description of the property is Government Lot 4, Section 12, Township 27 North, Range 15 East, Town of Wescott, Shawano County.
2. The size of the Galaszewski property is approximately 500 feet long and 400 feet wide. A strip of wetlands bisects the Galaszewski property lengthwise. In 1997, Mr. Galaszewski subdivided his property into two lots. Lot 1 is approximately 500 feet long by 190 feet wide. Lot 2 is approximately 500 feet long by 210 feet wide. Mr. Galaszewski's house and two garages are located on Lot 2. Mr. Galaszewski intends to retain Lot 2 and sell Lot 1.
3. In order to make Lot 1 more marketable, Mr. Galaszewski is seeking water quality certification from the Department of Natural Resources (Department) for authority to fill a twenty foot wide by 115 foot long strip of the wetlands. This filled strip could be used as a driveway to a building site along the Wolf River. The area filled would be 2300 square feet, approximately .05 of an acre.
4. A prior owner of the property filled a strip through the wetlands. This strip is on what is now Lot 2. The filled strip is used as a walkway to gain access to the Wolf River. The filled strip has segmented the wetlands. The Department initially was concerned that a second filled strip would further segment the wetlands and negatively impact the functional values of the wetlands. In response to the Department's concerns, Mr. Galaszewski amended the application, relocating the proposed driveway from the middle of Lot 1 to the northern boundary of the lot. Although the proposed fill will still result in the destruction of .05 of an acre of wetlands it will no longer result in further segmenting because the area to be filled is located at the edge of the wetlands.
5. The petitioners, particularly Leonard Pubanz, who owns the property on the north side of Lot 2, are concerned generally that any more filling will negatively impact the functional value of these wetlands, and specifically that the proposed fill will further exacerbate what they

view as a drainage problem in the area. Mr. Pubanz testified that stormwater and other water historically drained from his property to the south through the wetlands to the Wolf River. As more of the wetlands are filled water is now backing up on his property resulting in ponding and wetter soil on his property.

6. Although additional filling of the wetlands will reduce the wetlands ability to store stormwater, intuitively, the major reason for the drainage problems on the Pubanz property appears to be the filled strip on Lot 1. This filled strip prevents water on Lot 1 from draining to the south and ultimately discharging to the Wolf River. Construction of a culvert through this strip would allow excess water to drain from Lot 1 through the wetlands. However, even if no such culvert were constructed, filling an additional .05 of an acre of the existing wetland will not cause significant additional drainage problems.

7. The proposed filling of the wetlands is requested in order to construct a driveway through the wetlands to a possible building site adjacent to the Wolf River. Construction of a driveway is not a wetland dependent activity and practicable alternatives to the fill exist. One alternative is to build upland of the wetlands (as has Mr. Galaszewski) and construct a boardwalk across the wetlands for access to the Wolf River. A second alternative is to obtain an easement to use the strip which is already filled on Lot 2 as a driveway to the building site on Lot 1. Mr. Galaszewski has rejected both alternatives because they would reduce the amount for which Lot 1 would sell.

8. No significant adverse impacts to the public interest in fish and wildlife habitat, flora diversity or natural scenic beauty will occur as a result of this proposed project.

9. No significant adverse impact on water quality will result if the fill is undertaken in accordance with the conditions established in the order.

10. No significant secondary impacts upon wetlands functional values will occur as a result of the proposed project.

11. No significant adverse cumulative impacts will occur as a result of the proposed project.

12. The petitioners have not carried the burden of proof to show that the proposed project will not meet existing standards if it is undertaken in conformance with the conditions set forth below. The proposed project meets requirements of Chapter NR 103, Wis. Adm. Code.

Discussion

Sec. NR 103.08(3), Wis. Adm. Code, provides:

To protect all present and prospective future uses of wetlands, the following factors shall be considered by the department in making determinations under this section:

- (a) Wetland dependency of the proposal;
- (b) Practicable alternatives to the proposal which will not adversely impact wetlands and will not result in other significant adverse environmental consequences;
- (c) Impacts which may result from the activity on the maintenance, protection, restoration or enhancement of standards under s. NR 103.03;
- (d) Cumulative impacts attributable to the proposed activity which may occur, based upon past or reasonably anticipated impacts on wetland functional values of similar activities in the affected area;
- (e) Potential secondary impacts on wetland functional values from the proposed activity; and
- (f) Any potential adverse impacts to wetlands in areas of special natural resource interest as listed in s. NR 103.04.

Sec. NR 103.08(4)(a) and (b), Wis. Adm. Code, provide:

(a) The department shall make a finding that the requirements of this chapter are not satisfied when it determines that:

1. An activity is not wetland dependent and the surface area of the wetland impact, which includes impacts noted in s. NR 103.08 (3), is greater than 0.10 acres, and
2. A practicable alternative exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences.

(b) For all activities which either do not meet the conditions in par. (a) or for cranberry activities, the department utilizing the factors in sub. (3) (b) to (f), shall determine whether the project proponent has shown that the activity will not result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences. If it is determined that significant adverse impacts will occur, the department shall make a finding that the requirements of this chapter are not satisfied. If it is determined that significant adverse impacts will not occur, the department shall make a finding that the requirements of this chapter are satisfied.

As found, the proposed activity, constructing a driveway, is not wetland dependent and practicable activities to filling a portion of the wetlands do exist. However, the proposed project will impact less than .10 acres. Accordingly, sec. NR 103.08(4)(a), Wis. Adm. Code, does not mandate a finding that the requirements of chapter NR 103, Wis. Adm. Code, are not satisfied. It is, therefore, necessary to consider the factors listed at sec. NR 103.08(3), Wis. Adm. Code.

The filling of .05 of an acre at the edge of the wetlands will have *de minimis* impact on the entire wetlands. Additionally, Robert Rossenberger, a water management specialist for the Department, testified that these wetlands are relatively low value wetlands. Although wetlands in general have an important ecological function, on balance, the Department determined that the .05 of an acre of wetlands at stake in this case did not justify the resources necessary to protect it because the adverse impacts resulting from the proposed project will be minimal.

Although the petitioners expressed concern about the destruction of an additional .05 of an acre of the wetlands by filling and the accompanying loss of wetland vegetation and wildlife habitat, the petitioners' primary concern in this case appeared to be about other alleged activities engaged in by Mr. Galaszewski. The petitioners presented evidence of other destructive activities conducted by Mr. Galaszewski such as spraying herbicides in the wetlands and dumping leaves and other debris into the wetlands. Even if these allegations are true and if the activities are unlawful it is not appropriate to respond to these allegations by denying water quality certification for the proposed project. The petitioners are also concerned that if a home is built on the river side of the wetlands, the homeowner will gradually fill more of the wetlands to increase the size of his yard. This concern is speculative and not an appropriate basis for denying the application for water quality certification.

The petitioners' concerns about the impact on drainage can be addressed by placing a culvert beneath the filled strip on Lot 2. If the Department determines that construction of such a culvert would be beneficial, the water quality certification has been amended so that it is conditioned on the construction of such a culvert. Another concern raised by the petitioners is that the proposed building site on the river side of the wetlands will ultimately be determined to be of insufficient size for the construction of a home. The water quality certification has also been amended so that it is conditioned on the issuance of a building permit. This condition is intended to ensure that the wetlands are not filled unnecessarily.

The Department, by granting the water quality certification, determined that the proposed project will not result in significant adverse impacts to water quality or other significant adverse environmental consequences. The petitioners have the burden to prove that this determination was in error. The petitioners have not satisfied this burden of proof.

CONCLUSIONS OF LAW

1. The Department has the authority pursuant to sec. 281.15, Stats., and Chapters NR 299 and NR 103, Wis. Adm. Code, to review proposals for the discharge of dredge and fill material to wetlands.

2. The proposed project will not result in violation of the standards contained in NR 103.08(3), Wis. Adm. Code in that significant adverse impacts to wetlands will not occur as a result of the proposal. The project will comply with the standards enumerated at sec. NR 299.04, Wis. Adm. Code.

3. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats., and NR 299 05(6), Wis. Adm. Code.

ORDER

WHEREFORE IT IS HEREBY ORDERED, in accordance with the foregoing Findings of Fact and Conclusions of Law, that water quality certification be granted for the filling of no more than .05 acres of wetlands as described in the application for water quality certification and as amended with respect to location of the fill subject to the following conditions:

1. The applicant must notify Water Management Specialist Robert Rossenberger not less than 5 days before starting the project and again not more than 5 days after the project is complete.

2. The applicant shall allow free and unlimited access to the project site at any time to any Department employee who is investigating the project's construction.

3. A copy of this approval shall be kept at the site during construction of the project.

4. The applicant is responsible for obtaining any permit or approval required by local zoning ordinances or by the Corps of Engineers before starting the project.

5. The authorization hereby granted by the Department is not transferable.

6. The fill is authorized for the purpose of constructing a driveway to a potential building site adjacent to the Wolf River (west of the wetlands). No fill shall be discharged into the wetlands unless and until a building permit for such a site is issued.

7. If the Department determines that adverse impacts to the wetlands will be reduced by construction of a culvert through the filled strip on Lot 2, the applicant shall construct a culvert of a size and at a location determined by the Department. The applicant shall be responsible for keeping said culverts free of sediment and clear of debris.

8. This permit may be rescinded or revoked if the Department determines that the conditions set forth above have not been followed or if it finds that the project results in

unanticipated significant adverse impacts to the functional values of wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences.

Dated at Madison, Wisconsin on December 23, 1998.

STATE OF WISCONSIN
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 220. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.